

No. 84-165

Office - Supreme Court, U.S.
FILED

DEC 28 1984

ALEXANDER C. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

W. GEORGE GOULD,

Petitioner,

v.

MAX A. RUEFENACHT,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

JOINT APPENDIX

ROBERT C. EPSTEIN, ESQ.
Hannoch, Weisman, Stern,
Besser, Berkowitz &
Kinney, P.A.
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Counsel for Respondent

**PETITION FOR CERTIORARI FILED
JULY 27, 1984
CERTIORARI GRANTED NOVEMBER 13, 1984**

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**DOCKET ENTRIES IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
NEW JERSEY**

Plaintiff

RUEFENACHT, MAX A.

Defendants

O'HALLORAN, CHRISTOPHER J.

CHRISTOPHER J. O'HALLORAN,

Third party plaintiff,

VS.

W. GEORGE GOULD, ESQ.,

Third Party Defendant.

W. GEORGE GOULD,

Third-party plaintiff,

-VS-

DAVID BERNSTEIN, AUTOBERN TRADING CO., INC.,
ERNEST STOECKLIN, LENZENHOF GMBH

Third-party defendants

CAUSE

(Cite the U.S. Civil Statute under which the Case is Filed
and Write a Brief Statement of Cause)

Securities Exchange Act of 1933, 15 USC § 77; Breach of
Fiduciary Duty

2a

Attorneys

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Autobern Trading Co.

Hochberg & Simon, Esqs.
80 Main St. West Orange, NJ 07052
(201) 736-5880
(D. Bernstein)

JS6 6-28-83

FILING FEES PAID			STATISTICAL CARDS	
DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
12-24-80	\$60.00 27683		JS-5	_____
6-28-83	\$70.00 #060857		JS-6	_____

3a

PLAINTIFF	DEFENDANT	Docket No. <u>80-4097</u>
Max A. Ruefenacht,	Christopher J. O'Halloran, etal	Page ___ of ___ Page ___

DATE	NR.	PROCEEDINGS
12-24-80	1	Complaint with <i>Jury Demand</i> filed 12-23-80.
12-24-80		Summons issued. (20 days)
2-4-81	5	Clerk's Order extending time for defendant Christopher J. O'Halloran to answer complaint from 2-3-81 to 2-18-81, filed 2-3-81. (Notice Mail)
2-19-81		Alias Summons issued as to defendant Joachim K. Birkle. (20)
3-4-81	10	Alias Summons and Affidavit of Service of Complaint on Feb. 25, 1981, as to defendant Joachim K. Birkle filed 3-3-81.
3-4-81	11	Summons returned unexecuted filed 3-3-81.
4-3-81	12	Stipulation and order extending time of defendant Christopher J. O'Halloran to answer complaint to April 3, 1981, filed 4-2-81. (Sarokin) Notice mailed
4-6-81	13	<i>Answer</i> of defendant, Christopher J. O'Halloran, <i>crossclaims</i> for contribution and indemnification against co-defendants, third-party complaint and demand for <i>jury</i> , filed 4-3-81.
4-6-81	14	Proof of service of answer of defendant, Christopher J. O'Halloran, <i>crossclaims</i> for contribution and indemnification, third party complaint and demand for <i>jury</i> , filed 4-3-81.
4-6-81		Third party summons issued. (20 days)

DATE	NR.	PROCEEDINGS
4-14-81	16	Summons on third-party complaint and Affidavit of Service returned served on third-party defendant, W. George Gould, Esq. on 4-8-81, filed 4-13-81.
4-29-81		Alias summons issued as to defendant, Continental Import & Export, Inc. (20 days)
5-6-81	18	Interrogatories of plaintiff directed to defendant, Christopher J. O'Halloran, filed 5-5-81.
5-11-81	19	Alias summons and Affidavit of Service of alias summons and complaint returned served on Continental Import and Export, Inc., on 5-7-81, filed.
5-28-81	20	Stipulation and Order extending time for third-party defendant, W. George Gould to respond to third-party complaint to 6-17-81, filed 5-27-81. (Meanor) Notice Mailed
6-5-81	21	Plaintiff's request for entry of default as to defendants, Joachim K. Birkle and Continental Import & Export, Inc., filed 6-4-81.
6-5-81		Default of defendants, Joachim K. Birkle and Continental Import & Export, Inc., for failure to appear, entered.
6-22-81	22	Notice of motion of third-party defendant, W. George Gould for dismissal of third-party complaint or alternatively to direct third-party plaintiff, Christopher J. O'Halloran to provide a more definite statement of the third-party claims returnable 7-13-81 and proof of service, filed 6-19-81. (Brief submitted)
6-29-81	23	Notice of plaintiff to take deposition of W. George Gould, filed 6-26-81.

DATE	NR.	PROCEEDINGS
6-29-81	24	Notice of plaintiff to take deposition of Christopher J. O'Halloran filed 6-26-81.
7-6-81	25	Request of third party defendant, W. George Gould for production of documents directed to plaintiff filed 7-2-81.
7-6-81	26	Notice of third party defendant, W. George Gould to take deposition of Max A. Ruefenacht filed 7-2-81.
7-10-81	28	Request of plaintiff for entry of default judgment against Joachim K. Birkle and Continental Import & Export, Inc., and Affidavit of amount due and of non-military service filed 7-9-81.
7-10-81	29	Interrogatories of Christopher J. O'Halloran directed to plaintiff filed 7-9-81.
7-14-81	31	Notice of defendant Christopher J. O'Halloran to take deposition of plaintiff and request for production of documents, filed 7-13-81.
7-17-81		Hearing on motion of third-party defendant, W. George Gould for dismissal of third-party complaint or to direct third-party plaintiff, Christopher J. O'Halloran to provide more definite statement. Ordered motion granted in part and denied in part. Order to be submitted. (Perretti) (7-13-81)
7-30-81	33	<i>Default judgment for \$120,000.00 in favor of plaintiff, Max A. Ruefenacht and against defendants, Joachim K. Birkle and Continental Import & Export, Inc., with costs, filed. Notice Mailed</i>
7-30-81	34	Plaintiff's costs taxed in the sum of \$83.60, filed

DATE	NR.	PROCEEDINGS
8-12-81	35	Order directing defendant-third-party plaintiff, Christopher J. O'Halloran to provide a more definite statement in the third party complaint, filed 7-30-81. (Perretti) Notice Mailed
8-21-81	36	Defendant-third party plaintiff, Christopher J. O'Halloran's more definite statement of third-party complaint, filed 8-20-81.
8-27-81	38	Clerk's order extending time for third-party defendant, W. George Gould, Esq. to answer third party complaint or for more definite statement for 15 days, filed. (Notice Mailed)
9-10-81	39	Notice of motion by plaintiff for leave to file an amended complaint ret. 10-13-81 and affidavit of service, filed. (Brief submitted)
9-16-81	40	Answer of third-party defendant, W. George Gould, Esq. to more definite statement of the <i>Third-Party Complaint</i> , filed 9-15-81.
9-25-81	41	Interrogatories of third party defendant, W. George Gould, Esq. directed to third party plaintiff, Christopher J. O'Halloran and request for production of documents, filed.
9-28-81	42	Interrogatories of third party defendant, W. George Gould, Esq., directed to plaintiff and request for production of documents, filed.
10-15-81		At call for hearing on motion by plaintiff for leave to file an amended complaint, court indicated consent order to be submitted (Perretti) (10-13-81)

DATE	NR.	PROCEEDINGS
11-4-81	43	Answers of plaintiff to interrogatories of defendant, Christopher J. O'Halloran, filed.
11-5-81	44	Interrogatories of plaintiff directed to third-party defendant, W. George Gould, filed.
11-17-81	45	Consent order permitting plaintiff leave to file an amended complaint etc., filed 11-16-81. (Perretti) Notice Mailed
11-24-81	46	Amended Complaint and <i>Jury Demand</i> and affidavit of service, filed.
12-16-81	47	Clerk's order extending time for third-party defendant, W. George Gould to answer amended complaint for a period of 15 days, filed 12-15-81. Notice Mailed
12-21-81	48	Answers of defendant/third-party plaintiff, Christopher J. O'Halloran to interrogatories of plaintiff, filed 12-18-81.
12-21-81	49	Answers of defendant/third-party plaintiff, Christopher J. O'Halloran to interrogatories of third-party defendant, W. George Gould, filed 12-18-81.
1-4-82	51	Interrogatories of defendant/third-party plaintiff, Christopher J. O'Halloran directed to third-party defendant, W. George Gould, filed 12-31-81.
1-11-82	53	Stipulation and order extending time for the third-party defendant, W. George Gould to answer the amended complaint for 30 days to January 30, 1982, filed 1-8-82. (Sarokin) Notice Mailed
1-18-82	54	Notice of Defendant W. George Gould to take deposition of Joachim K. Birkle filed.
2-4-82	55	Answer of defendant, W. George Gould to amended complaint; <i>crossclaims</i> against co-defendants, Joachim K. Birkle, Continental Import & Export, Inc., and Christopher J. O'Halloran; <i>Third-Party Complaint</i> and <i>Jury Demand</i> , filed.

DATE	NR.	PROCEEDINGS
2-4-82		Third-party summons as to third-party defendants, David Bernstein and Autobern Trading Co., Inc., issued. (35 days)
2-4-82		Third-party summons as to third-party defendant, Ernest Stoecklin, issued. (20 days)
2-4-82		Summons on crossclaim as to defendant, Continental Import & Export Inc., issued.
2-4-82		Summons on crossclaim as to defendant, Joachim K. Birkle, issued.
2-11-82	59	Deposition of Max A. Ruefenacht taken 12-21-81, filed 2-10-82.
2-11-82	60	Continued deposition of Max A. Ruefenacht taken 1-19-82, filed 2-10-82.
3-2-82	62	Notice of motion of defendant/third-party plaintiff, W. George Gould for dismissal of amended complaint for lack of jurisdiction returnable 3-22-82 and proof of service, filed 3-1-82. (Brief submitted)
3-8-82	63	Summons on third-party complaint returned unexecuted as to third-party defendants, David Bernstein and Autobern Trading Co., filed 3-5-82.
3-11-82		Alias summons on third-party complaint as to third-party defendant David Bernstein and Autobern Trading Co., Inc., issued. (35 days)
3-2-82	65	Summons on third-party complaint returned served on third-party defendant, Ernest Stoecklin on 2-9-82, filed 3-11-82.
3-22-82	66	Alias summons on third-party complaint returned served on third-party defendants, David Bernstein and Autobern Trading Co., on 3-17-82, filed.

DATE	NR.	PROCEEDINGS
3-23-82	67	Deposition of Joachim K. Birkle taken 1-29-82, filed.
3-31-82	68	Affidavit of Max A. Ruefenacht, filed.
4-5-82	69	Answer of third-party defendant, Ernest Stoecklin to <i>third-party complaint</i> and <i>jury demand</i> , filed 4-2-82.
4-5-82	70	Affidavit of Theresa A. Branin, filed 4-2-82.
4-8-82	71	Stipulation and order extending time for third-party defendant, Ernest Stoecklin to answer third-party complaint to April 1, 1982, filed. (Fisher) Notice Mailed
4-19-82	72	Answers of Defendant/Third Party Defendant W. George Gould to Initial Interrogatories of Defendant/Third Party Plaintiff Christopher J. O'Halloran filed 4-16-82.
4-19-82	73	Answers of Defendant/Third Party Defendant W. George Gould to First Set of Interrogatories of Plaintiff filed 4-16-82.
4-19-82	74	Affidavit of Service of Answers to Interrogatories (Docs. 72 & 73) of defendant/third party defendant W. George Gould filed 4-16-82.
4-20-82	75	Deposition of Christopher J. O'Halloran taken March 25, 1982, filed.
4-21-82	76	Affidavit of Plaintiff Max A. Ruefenacht filed 4-20-82.
4-28-82		Hearing on motion of defendant/third-party plaintiff, W. George Gould for dismissal of amended complaint for lack of jurisdiction. Ordered motion denied without prejudice. Order to be submitted (Sarokin) 4-26-82)
5-3-82	77	Answer of third-party defendant, David Bernstein to third-party complaint and <i>jury demand</i> , filed.

DATE	NR.	PROCEEDINGS
5-7-82	78	Order denying motion of defendants, W. George Gould and C.J. O'Halloran and third-party defendant, E. Stoecklin for summary judgment, filed 5-6-82. (Sarokin) Notice Mailed
5-11-82	79	Answer of third-party defendant, Autobern Trading Co., Inc., to third party complaint and jury demand, filed 5-10-82.
5-11-82	80	Affidavit of Doreen E. Ballantyne, filed 5-10-82.
5-20-82	81	Deposition of Christopher J. O'Halloran taken 4-2-82, filed.
6-7-82		Status Conference. (Sarokin) (6-4-82)
6-14-82	82	Substitution of attorney on behalf of third-party defendant, Ernest Stoecklin, filed.
6-24-82	83	Notice of plaintiff to take deposition of Joachim K. Birkle and request for production of documents, filed.
6-24-82	84	Notice of motion by plaintiff for reconsideration of court's order. limited the denial of defendants' motion for summary judgment without prejudice and ordered motion be denied with prejudice 7-26-82 and affidavit of mailing, filed. (Brief attached)
7-7-82	85	Bench Opinion, filed 7-6-82. (Sarokin) (denying motion of defendants for summary judgment.)
8-11-82	86	Transcript of Proceedings held 6-24-82, filed.
8-30-82	87	Notice of plaintiff to take deposition of defendant, W. George Gould, filed.
9-17-82	88	Affidavit of mailing of copy of memorandum of defendant, W. George Gould in opposition to motion of plaintiff for reconsideration, filed 9-16-82.

DATE	NR.	PROCEEDINGS
10-12-82		Third-party summons as to third party defendant, Lenzenhof GmbH, issued. (35 days)
10-13-82		At call for hearing on motion by plaintiff for reconsideration of Court's order which limited the denial of defendants' motion for summary judgment without prejudice and ordered motion be denied with prejudice, Court indicated motion to be decided pursuant Rule 70. (Sarokin) (10-12-82)
10-18-82	88	Notice of motion of plaintiff to direct defendant, W. George Gould to produce documents at his deposition returnable 10-18-82 and affidavit of service, filed 10-14-82. (No brief)
10-19-82	89	Notice of motion of plaintiff for a Writ of Ne Exeat or in the the alternative for a Writ of Capias Ad Satisfaciendum against defendant, Joachim K. Birkle returnable 10-25-82, filed 10-18-82. (Brief submitted)
10-20-82		Hearing on motion of plaintiff to compel production of documents by defendant W. George Gould at his deposition pursuant to a request to produce documents. Ordered motion granted in part and denied in part. Order to be submitted. (Perretti) (10-1-82)
10-26-82	91	Affidavit of service of copy of notice of motion, supporting affidavit proposed order, Writs and Memorandum of Law, filed 10-25-82.
10-26-82		Hearing on motion of plaintiff for Writ of Ne Exeat or in the alternative for a Writ of Capias Ad Satisfaciendum against defendant, Joachim K. Birkle. Ordered motion granted for Writ of Ne Exeat. Order to be submitted. (Sarokin) (10-25-82)

DATE	NR.	PROCEEDINGS
11-22-82	93	Transcript of hearing held 6-24-82, filed 11-19-82.
11-23-82		\$5,000.00 deposited in registry on 11-19-82.
11-23-82	94	Clerk's certificate of Cash Deposit, filed.
11-23-82	95	Order directing the Court to issue Writ of Ne Exeat as to defendant Joachim K. Birkle and directing plaintiff to post a bond for \$5,000.00 as a condition for the issuance of Writ etc., filed 11-19-82. (Sarokin) Notice Mailed
11-23-82		Writ of Ne Exeat as to Joachim K. Birkle, issued.
2-10-82	97	Affidavit of Frederick R. Dunne, Jr., filed 12-9-82.
1-5-83	98	Order extending the return date of the Writ of Ne Exeat as to defendant, Joachim K. Birkle to 1-31-83, filed 1-4-83. (Sarokin) Notice Mailed
1-5-82	99	Affidavit of Edward T. Ehler, filed 1-4-83.
1-5-83	100	Transcript of hearing held 11-19-82, filed.
1-21-83	101	Order denying motion of plaintiff for reconsideration of order of 5-6-82, which limited the denial of motion of defendants for summary judgment etc., filed. (Sarokin) Notice Mailed
1-31-83	102	Report and Recommendation, filed. (Perretti) Notice Mailed
2-15-83		Writ of Execution issued and recorded in Book AA on Page 98 of the Book of Executions. (mailed to U.S. Marshal - Newark)
2-17-83	103	Order directing Gail Lowenstein Realtors to cooperate with the U.S. Marshall and permit them to enter the former residence of defendant, Joachim K. Birkle, located at 247 Underhill Road, South Orange, New Jersey, filed 2-14-83. (Sarokin) Notice Mailed

DATE	NR.	PROCEEDINGS
2-17-83	104	Affidavit of Max Ruefenacht, filed 2-14-83.
2-17-83		Hearing on application of plaintiff for order directing Gail Lowenstein Realtors to cooperate with U.S. Marshal to enter residence of defendant, Joachim K. Birkle to execute writ of execution. Ordered application granted. (Sarokin) (2-14-83)
2-25-83	105	Notice of motion of defendant, W. George Gould for summary judgment dismissing complaint returnable 3-28-83, filed 2-24-83. (Brief submitted)
2-25-83	106	Affidavit of mailing of copy of notice of motion, proposed order and supporting brief, filed 2-24-83.
3-30-83		Hearing on motion of defendant, W. George Gould for summary judgment dismissing complaint. DECISION RESERVED. (Sarokin) (3-28-83)
5-3-83	107	Bench Opinion, filed 4-29-83. (Sarokin) (regarding motion of W. George Gould for summary judgment etc.)
5-13-83	108	Order directing the Clerk of the court to release the sum of \$5,000.00 to plaintiff deposited on 11-19-82 for issuance of a Writ of Ne Exeat etc., filed 5-12-83. (Sarokin) Notice Mailed
5-16-83	109	Order granting motion for summary judgment with costs in favor of defendant, W. George Gould and against plaintiff, Max A. Ruefenacht; and dismissing complaint, filed 5-16-83. (Sarokin) Notice Mailed
6-28-83	110	Notice of appeal of plaintiff, filed 5-26-83 at 1:00 P.M.

DATE	NR.	PROCEEDINGS
6-28-83		Copies of notice of appeal sent to Cohn & Lifland, Esqs., Lum, Biunno & Tompkins, Dunne & Waller, Esqs., Hochberg & Simon, Esqs., James D. Opfer, Jr., Esq. and Clerk U.S.C.A.
6-30-83	111	Amended, order granting motion for summary judgment as to all defendants for lack of jurisdiction without costs, filed 6-29-83. (Sarokin) Notice Mailed (Copy sent to U.S.C.A.)
7-13-83	113	Amended notice of appeal of plaintiff, filed 7-12-83 at 8:30 A.M.
7-13-83		Copies of notice of appeal sent to Cohn & Lifland, Esqs., Lum, Biunno & Tompkins, Esqs., Dunne & Waller, Esqs., Hochberg & Simon, Esqs., James D. Opfer, Jr., Esq. and Clerk, U.S.C.A.

**UNITED STATES COURT OF APPEALS
FOR THE THIRD COURT**

Case Closed _____ DOCKET NO. 83-5493

Related Cases _____ CALENDARED FOR: 5-14-84

Transferred from C.A. Misc. Record No. _____

ORIGIN: DIST OF NJ-Newark

DC DOCKET NO. 80-4097

DC JUDGE H. Lee Sarokin

FILED IN DC 12-23-80

NOA FILED 5-26-83: Amended 7/12/83

CASE TYPE CIVIL-Securities Exchange Act

DOCKETED: 6-30-83

☒ Fee Paid ☐ IFP ☐ CJA

☐ CPC Granted _____

DISCLOSURE Applt. 7-11-83

STATEMENT Appee. 7-11-83 [W. Geo. Gould] see below

16a

TITLE OF CASE

RUEFENACHT, MAX A.,

VS.

O'HALLORAN, CHRISTOPHER J., JOACHIM K. BIRKLE AND
CONTINENTAL IMPORT & EXPORT, INC., AND W. GEORGE
GOULD

CHRISTOPHER J. O'HALLORAN,

Third-party plaintiff

VS.

W. GEORGE GOULD, ESQ.,

Third-party defendant

W. GEORGE GOULD,

Third-party plaintiff

VS.

DAVID BERNSTEIN, AUTOBERN TRADING CO., INC.,
ERNEST STOECKLIN, LENZENHOF GMBH,

Third-party defendant

RUEFENACHT, MAX A.,

Appellant

17a

APPEARANCES

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201-845-0600

APPELLEE/RESPONDENT:

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Besser, Berkowitz

& Kinney, P.A.

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201-621-8800

[W. George Gould]

George S. Hochberg 12-8-83

Richard I. Simmon 8-17-83

Hochberg & Simon, P.A.

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DISC. STMT 8-17-83

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201-736-5880

[David Bernstein]

NO. 83-5493

RECORD, EXHIBITS & BRIEF INFORMATION/Filing:

10-28-83 Partial Rec. or Cert. List

Record on Appeal ☐ IMPOUNDED

Covers #

Transcript filed in DC:

1st Supp. Record

2nd Supp. Record

Exhibits ☐ EX. RM. ☐ SAFE

Administrative Transcript

10-28-83 Briefing Notice Issued_____ Covers #

12-6-83 Brief for Applt. MS 12-6-83

Brief for Applt./

Cross Appee.

1-4-84 Brief for Appee. MS 1/4/84 (10cc) (Gould)

1-6-84 Brief for Appee. MS 1-6-84 (11cc) (O'Halloran)

Brief for Appee.

Brief for Appee./

Cross Applt.

Reply B. for Applt./

Cross Appee.

1-20-84 Reply B. for Applt. MS 1-20-84 (10cc)

Supp. B. for Applt.

Supp. B. for Apppee.

12-7-83 Brief for Amicus MS 12-7-83 (SEC)

Intervenor

12-6-83 Appendix MS 12-6-83 (4cc-2 VOC.)

EXTENSION Flg.	Motion for:	Ord Fld.	Ext. to:
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Record List

Transcripts

Applt's. Brief

Appée's. Brief

Appée's. Brief

Appée's. Brief

Reply Brief

Supp. Appendix

SUMMARY OF EVENTS

ARGUED/SUBMITTED 5/14/84
 PANEL Gibbons, Hunter, C.J. & Rambo, D.J.
 REARGUED _____
 JUDGMENT-ORDER _____
 OPINION 6/11/84 ☒ Signed ☐ ~~En Banc~~ or Pub
 MO Gibbons CO Hunter DO _____
 JUDGMENT reversing and remanding to the said D.C.
for further proceedings consistent w/the opinion of
this Ct w/costs taxed against appellees, filed.
 PET. FOR REHG. _____
☐ Denied ☐ Granted ☐ En Banc ☐ Panel
 MANDATE STAYED TO: 8/1/84
 MANDATE ISSUED _____
 RECORD RETURNED _____
 BILL OF COSTS 6/18/84 of Appellant
 CERTIORARI FILED 7/27/84
☐ Denied ☒ Granted (ch)
11/13/84 S.C. # 84-165
 Reported at 737 F2d 320 (84)

CONTINUATION (CAPTION/APPEARANCES):
 SEE DOCKET ENTRIES ON PAGE TWO

Rosalind C. Cohen 4-23-84
 Jacob H. Stillman 12-8-83
 Securities and Exchange Commission
 450 5th Street, N.W.
 Washington, D.C. 20549
 FTS 272-2493

[Securities and Exchange Commission, amicus curiae.]

Robert J. Kelly 1-9-84
 TOMPKINS, McGUIRE & WACHENFELD
 550 Broad Street DISC.STMT 1-9-84
 Newark, NJ 07102
 201-622-3000

[Appellee Christopher J. O'Halloran]

[Appellee Christopher J. O'Halloran]

UNITED STATES COURT OF APPEALS
 FOR THE THIRD CIRCUIT

DOCKET NO. 83-5493

DATE	FILINGS—PROCEEDINGS
<u>1983</u>	
Aug. 8	Letter dated 8/4/83 from Frederick R. Dunne, Jr., Esq., counsel for appee Autobern Trading Corp., advising that they have been instructed by aplt. Ruefenacht, owner of stock of Auto. Corp., that he does not wish Autobern to be represented in this matter, etc., and therefore will not be filing anything w/the Ct., rec'd. Send to Merits Panel
Aug. 25	ORDER (Clerk) directed to Wm. Sokol, Official C.R., to Show Cause in writing, orig & 3 ccs by 9/4/83 why he should not be subject to sanctions for his/her delay in the prosecution of the appeal, filed. DISCHARGED 9/7/83
Sept. 6	Letter-Answer dated 8/30/83 from Wm. Sokol, Official C. Rep., in which he advises that the transcript which he was responsible for was filed in D.C. 8/30/83, in answer to Show Cause order of 8/25/83, filed.
Sept. 7	ORDER (Clerk) that upon consideration of letter-answer to Order to Show Cause, rec'd from Wm. Sokol, Official C.R., the Order to Show Cause of 8/25/83, be and hereby is DISCHARGED, filed.
Dec. 5	Letter dated 11/28/83 from James D. Opfer, Jr., Esq., cnsl for appee Ernest Stoecklin advising that he will bet be filing any brief on behalf of his client either in a positive way or in response to briefs filed by others, w/copy of letter from Stoecklin, rec'd. Send to Merits Panel

DATE	FILINGS—PROCEEDINGS
<u>1984</u>	
Jan. 11	Letter-joinder dated 1/9/84 from P.F. Pasternak, Esq., cnsl for appee David Bernstein advising that they will not submit a brief in this matter, but will join in any brief which may be submitted by other appees, rec'd. Send to Merits Panel
Jan. 12	Statement of aplee W. George Gould requesting oral argument purs to Rule 12(6) of Rules of U.S. Ct. of Appeals for Third Circuit, filed. Send to Merits Panel
Mar. 30	Letter dated 3/27/84 from Peter S. Pearlman, Esq., cnsl for aplt, pursuant to Rule 28(j), F.R.A.P., rec'd. for Ct's information.
Apr. 2	Motion by amicus curiae, The Securities and Exchange Commission, for leave to participate at oral argument, in which it requests to be allotted ten (10) minutes in which to present argument, filed.
Apr. 25	Order (<i>Gibbons</i> , Hunter, C.J. & Rambo, D.J.) granting above motion, filed.
Jun 27	Motion by Appellee, W. George Gould for a 30-day stay of the mandate, etc., filed. w/serv.
Jul 9	Partial Opposition of Appellant, Max A. Ruefenacht, to Appellee's motion for stay of mandate, w/service
Jul 27	Copy of Petition for a writ of cert. received from printer on behalf of counsel for Gould, received.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Civil Action No.
80-4097

MAX A. RUEFENACHT,

Plaintiff,

-VS-

CHRISTOPHER J. O'HALLORAN, JOACHIM K. BIRKLE,
CONTINENTAL IMPORT & EXPORT, INC., AND W. GEORGE
GOULD,

Defendants.

AND

CHRISTOPHER J. O'HALLORAN,

Third-Party Plaintiff,

-VS-

W. GEORGE GOULD,

Third-Party Defendant.

Honorable H. Lee Sarokin

AMENDED COMPLAINT AND JURY DEMAND

Plaintiff, MAX A. RUEFENACHT, residing at 25 Buckley Hill Road, Morristown, Morris County, New Jersey, by and through his attorneys, COHN & LIFLAND, ESQS., complains of the defendants as follows:

JURISDICTION AND VENUE

1. Jurisdiction and venue of this court are founded upon Section 22 of the Securities Act of 1933 (hereinafter the 1933

Act), 15 U.S.C. § 77v and Section 27 of the Securities Exchange Act of 1934 (hereinafter the 1934 Act), 15 U.S.C. 78aa.

2. The claims herein arise pursuant Sections 12 and 17 of the 1983 Act and Section 10b of the 1934 Act and the Rules and Regulations of the Securities and Exchange Commission promulgated thereunder including Rule 10b-5 and under the common law of fraud, negligence, reckless and negligent misrepresentation and breach of fiduciary duty.

3. Many of the acts and the conduct, combination and conspiracy charged herein, including the preparation of false and misleading financial statements, prospectuses and the issuance and dissemination of financial information to the investing public in general and this plaintiff in particular occurred in the District of New Jersey.

4. In connection with the acts, conduct, combination and conspiracy alleged in this complaint the defendants, directly and, indirectly, used the means and instrumentalities of interstate commerce including the mails and interstate telephone communications.

PARTIES

5. The nature and identify of the parties set forth in the caption of the complaint are as follows:

A. The plaintiff, MAX A. RUEFENACHT, is and was at all times relevant hereto a resident of the State of New Jersey. He is presently the owner of two thousand five hundred (2500) shares of common stock of Continental Import & Export, Inc., which represents fifty (50%) percent of the issued and outstanding common stock of that corporation. The plaintiff purchased that stock from the defendant, Continental Import & Export, in July of 1980.

B. The defendant, CONTINENTAL IMPORT & EXPORT, INC., (hereinafter Continental), is a corporation incorporated under the laws of the State of New Jersey maintaining its principal offices at 55 Morris Avenue, Springfield, New

Jersey 07081. Continental has authorized capital stock as follows: ten thousand (10,000) shares of common stock with no par value and ten thousand (10,000) shares of preferred stock with no par value. Five thousand (5000) shares of common stock of Continental have been issued and are outstanding. They are owned by the following persons in the following amounts:

<u>Name</u>	<u>NUMBER OF SHARES OF COMMON STOCK</u>
Lenzenhof GmbH	1,250 shares
Joachim K. Birkle	1,225 shares
Elisabeth Birkle	25 shares
Max A. Ruefenacht	2,500 shares

To the best of plaintiff's knowledge no preferred stock has been issued.

C. The defendant, JOACHIM K. BIRKLE, (hereinafter Birkle), is and at all times in question has been a resident of the State of New Jersey residing at 247 Underhill Road, South Orange, New Jersey 07079. At all times relevant hereto Birkle was the President, Chief Operating Officer and director of Continental and as such had full knowledge and control of the financial affairs of that corporation. Prior to the plaintiff's purchase of two thousand five hundred (2500) shares of common stock of Continental as set forth in paragraph 5A above, Birkle owned 1225 shares (49%) of Continental, Lenzenhof GmbH, a German corporation of which Birkle had complete operating control, owned 1250 shares (50%) of Continental and Birkle's wife, Elisabeth Birkle, owned 25 shares (1%) of Continental. That shareholding has continued down to the present as a result of which Birkle presently owns or controls directly and indirectly fifty (50%) percent of the outstanding shares of stock of Continental.

D. The defendant, CHRISTOPHER J. O'HALLORAN, (hereinafter O'Halloran), is and at all times in question has been a resident of the State of New Jersey and a licensed certified public accountant practicing the profession of public

accountancy at his offices located at the Valley Park Professional Center, 2517 Route 35, Building E, Wall Township, New Jersey 08736. In his capacity as a certified public accountant O'Halloran has at all times relevant hereto performed all of the accounting work for Continental and did prepare various financial statements for and on behalf of Continental at Birkle's request including, but not limited to, the financial statements complained of herein.

E. The defendant, W. GEORGE GOULD (hereinafter GOULD), is and at all times in question has been a resident of the State of New Jersey and an attorney at law licensed to practice in that state, maintaining his professional offices at 64A White Street, Red Bank, New Jersey. At the times at which various of the wrongful acts alleged herein occurred GOULD was the corporate counsel, an agent and a director of CONTINENTAL.

**FIRST CAUSE OF ACTION AGAINST ALL OF THE
DEFENDANTS PREDICATED ON VIOLATION OF
SECTION 12(1) OF THE 1933 ACT 15 U.S.C. SECTION
771(1)**

6. The plaintiff incorporates herein by reference as though recited verbatim and at length all of the allegations of paragraphs 1 through 5 of the complaint.

7. In and before July of 1980 the defendants did offer and solicit through means and instrumentalities of interstate commerce [sic] including the mails and telephone the sale of certain securities specifically shares of stock (hereinafter securities) in Continental. Said offers were made through various items of correspondence and telephonic communications conducted by the individual defendants and intermediaries on their behalf with the plaintiff. The offers so made constitute an "offer to sell a security" as defined by Section 2(3) of the 1933 Act (15 U.S.C. § 77b(3)). The defendants further transmitted offers to sell and prospectuses including financial statements, through means and instrumentalities of interstate commerce.

8. The plaintiff alleges that at the time of the offer to sell the securities there was no registration statement in effect as to the securities all as required by Section 5 of the 1933 Act (15 U.S.C. § 77e). Hence, the sale of the securities by the defendants to the plaintiff violated Section 5 of the 1933 Act.

9. In reliance upon various representations made by the defendants in the prospectuses and otherwise the plaintiff did purchase the securities from Continental. In furtherance of that purchase the plaintiff did advance the sum of One Hundred Twenty Thousand (\$120,000) Dollars in cash to the defendants, Continental and Birkle.

10. The plaintiff has made a demand upon the defendants for rescission of the purchase of the securities including the return of the consideration paid pursuant to Section 12 of the 1933 Act and has offered to tender and has tendered his securities in connection therewith, however, the defendants have refused and declined to rescind the transaction.

WHEREFORE, plaintiff, MAX A. RUEFENACHT, demands judgment against the defendants, CHRISTOPHER O'HALLORAN, JOACHIM K. BIRKLE, W. GEORGE GOULD and CONTINENTAL IMPORT & EXPORT, INC., on the First Cause of Action as follows:

A. Restoring to the plaintiff the consideration paid for the securities with interest thereon less any amount of any income received thereon pursuant to Section 12 of the Securities Act of 1933, 15 U.S.C. § 771.

B. Costs of suit incurred including reasonable attorney's fees, expert's fees, disbursements and such costs as may be taxed by the Clerk of the Court.

C. Such other and further relief as the Court may deem just in the premises.

**SECOND CAUSE OF ACTION AGAINST ALL OF THE
DEFENDANTS PREDICATED UPON VIOLATION OF
SECTION 12(2) OF THE SECURITIES ACT OF 1933, 15
U.S.C. § 771(2)**

11. Plaintiff incorporates herein by reference as though recited verbatim and at length all of the allegations of paragraphs 1 through 5 and 7 through 10 of the complaint.

12. Continental with the aid, assistance and cooperation of Birkle, Gould and O'Halloran did solicit the sale of, offer to sell and, in fact, did sell two thousand five hundred (2500) shares of its common stock (the securities) to the plaintiff on or about July 1, 1980 by the use and means and instruments of transportation and/or communications in interstate commerce and/or of the mails by means of prospectuses and/or oral communications which included untrue statements of material facts and/or omitted to state material facts necessary in order to make the statements in the light of the circumstances under which they were made not misleading.

A. Specifically, by way of example only and not by way of limitation, the plaintiff alleges that the defendants did make the following material misrepresentations of fact to him:

i. The defendants represented that Continental had substantial and valuable assets including, but not limited to, good will primarily consisting of licenses worth \$250,000 and certain import contract rights worth \$400,000.

ii. The defendants represented that Continental did have a surplus in excess of par value of \$650,000.

iii. The defendants did represent that Continental had a total equity of \$ 792,917.

iv. The representations referred to in paragraph 12 sub-paragraphs i, ii and iii above were made by the defendants in a financial statement prepared by the defendant O'Halloran on February 6, 1980 which purported to represent the financial position of Continental at December 31, 1979. The information for that financial statement emanated from Continental and the three individual defendants. The statement was prepared on behalf of and at the solicitation of Continental.

v. The statements aforesaid were repeated in substance in a financial statement prepared on September 29, 1980 purporting to represent the financial condition of Continental at July 31, 1980 wherein it was stated that Continental's good will and licenses had a value of \$250,000, its import contract rights

had a value of \$400,000, that its surplus from valuation of contracts and licenses was \$650,000 and that the corporation had a total equity of \$968,946. This latter financial statement was prepared by the defendant O'Halloran with the help, aid and solicitation of the defendants, Continental, Gould and Birkle.

vi. The defendants represented that Continental was negotiating contracts for nationwide distribution with two major firms and that there were distributors in various states interested in distribution rights for their areas.

vii. The defendants represented that sales for the first twelve (12) months of a nationwide distribution scheme beginning July 1980 would be \$6,186,000 yielding a gross profit of \$2,550,000 and a net profit of \$848,000.

viii. The defendants represented that a sales program concentrating on the New York - New Jersey Metropolitan area would yield a rewarding return on the investment made and that the sales in such a plan for twelve (12) months beginning July 1, 1980 would be \$5,326,000 yielding a gross profit of \$3,018,500 and a net profit of \$1,197,000.

ix. The defendants represented that the sales of Continental would increase by at least ten (10%) percent in the second year of operation over and above those projections set forth in sub-paragraphs vii and viii above.

x. The representations in sub-paragraphs vi through ix above were confirmed in a prospectus dated April 15, 1980 prepared by or with the aid and directions of the defendants Birkle, Gould and O'Halloran for and on behalf of Continental.

xi. The defendants represented that Birkle was a successful, sophisticated, and experienced businessman.

B. In fact:

i. Continental did not have good will or licenses worth \$250,000 but rather, the licenses were worth approximately \$7000.

ii. Continental did not have import or contract rights worth \$400,000 but rather, had no substantial import or contract rights.

iii. Continental did not, in fact, have a surplus but in actuality maintained a deficit and was running at an increasingly large deficit.

iv. Continental was not seriously negotiating contracts for nationwide distribution with two major firms nor were there distributors in various states seriously interested in distribution rights for their areas nor did it have any reasonable expectation that it would be able to establish such a distribution network in the foreseeable future.

v. Continental could not reasonably foresee sales on [sic] profits to the extent projected in the prospectus dated April 15, 1980.

vi. Birkle had been involved in numerous business failures and/or insolvencies in the past with other business.

vii. The sales programs outlined could not progress as represented and would not and could not reasonably be expected to yield the gross sales or the profitability projected. All of which the defendants knew or in the exercise of reasonable care should have know.

C. Specifically by way of example only but not by way of limitation the plaintiff alleges that the defendants omitted to state the following material facts to the plaintiff:

i. That Continental had a net deficit rather than a positive equity.

ii. The good will and licenses of Continental had a minimal value at best and not a value which approached that reflected in the financial statements given.

iii. That Continental had no or very minimal contract rights which rights were not of a value which approached that reflected in the financial statements given.

iv. That Continental had no material contacts with distributors in the United States and would not be able to establish a distribution network as outlined in the foreseeable future.

v. That Continental could not attain the sales figures set forth in the prospectus of April 15, 1980.

vi. That Continental would need available financing or credit of not less than \$3,000,000 to purchase the inventory needed to meet the sales projections in the prospectus of April 15, 1980.

vii. That Continental had no access to adequate financing to acquire the inventory needed to make the sales and meet the projections in the prospectus of April 15, 1980.

viii. That Birkle had been involved in numerous business failures and/or insolvencies in the past with other entities.

D. The misstatements and omissions referred to above were material in that had the true facts been stated the plaintiff would not have purchased the securities.

13. The plaintiff did rely upon the misstatements and was misled by the omissions set forth above in connection with and as a material part of his decision to purchase the securities.

14. The plaintiff has made a demand upon Continental for the rescission of the purchase of the securities including the return of the consideration paid and has offered to tender and has tendered his securities in connection therewith, however, the defendants have refused and declined to rescind the transaction.

WHEREFORE, plaintiff, MAX A. RUEFENACHT, demands judgment against the defendants, CHRISTOPHER O'HALLORAN, JOACHIM K. BIRKLE, W. GEORGE GOULD and CONTINENTAL IMPORT & EXPORT, INC., on the Second Cause of Action as follows:

A. Restoring to the plaintiff the consideration paid for the securities with interest thereon less any amount of any income received thereon pursuant to Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2).

B. Costs of suit incurred including reasonable attorney's fees, expert's fees, disbursements and such costs as may be taxed by the Clerk of the Court.

C. Such other and further relief as the Court may deem just in the premises.

**THIRD CAUSE OF ACTION AGAINST ALL OF THE
DEFENDANTS UNDER SECTION 17(a) OF THE 1933
ACT, 15 U.S.C. 77q(a) SECTION 10b OF THE 1934 ACT, 15
U.S.C. 78j(b) AND RULE 10b-5 PROMULGATED
THEREUNDER**

15. Plaintiff incorporates herein by reference as though recited verbatim and at length all of the allegations of paragraphs 1 through 5, 7 through 10, and 12 through 14 of the complaint.

16. The plaintiff alleges that the defendants and each of them by their conduct did offer for sale and sell to him securities by the use and means of instruments of transportation or communication in interstate commerce and/or by the use of the mails and did directly and indirectly:

A. Employ devices, schemes and artifices to defraud; and/or

B. Did obtain money and property by means of untrue statements of material fact and/or omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading; and/or

C. Did engage in transactions, practices and/or courses of business which operated and tended to operate as a fraud and/or deceit upon the plaintiff.

17. All of the defendants herein knew of and/or were on notice of and/or recklessly disregarded the facts indicating the material and misleading nature of each statement described in paragraph 12 and all sub-parts thereof and each defendant herein either issued, participated in the issuance of or aided and abetted the issuance of each of the aforesaid statements as follows:

A. Birkle as the sole operating officer and director and the managing employee of Continental participated in and knew of the true nature of the operations, statements of assets, status of contracts and licenses and all other misleading characteristics of the misleading statements and failures to state material facts alleged in paragraph 12 and all sub-parts thereof and knew of and/or recklessly disregarded the impact of those items on the value of the securities offered for sale and sold to the plaintiff and also knew of and/or recklessly disregarded the facts which showed that the financial statements and other prospectuses and documents given to the plaintiff were materially misleading. His knowledge and conduct are imputed to Continental on whose behalf, *inter alia*, he acted.

B. O'Halloran knew of the true nature of the operations, statements of assets and earnings and the other misleading characteristics of the misleading statements and failures to state material facts alleged in paragraph 12 and all sub-parts thereof and knew of and/or recklessly disregarded the impact of these items on the value of the securities offered for sale and sold to the plaintiff and participated in the formation and preparation of financial statements and other prospectuses which were materially misleading. Further, the defendant O'Halloran did deliberately and/or recklessly ignore and violate various sections of the Statement on Standards for Accounting and Review Service issued by the American Institute of Certified Public Accountants specifically among others statement 1 "Compilation and Review of Financial Statements" which provides, *inter alia*:

"7. The accountant should not submit unaudited financial statements of a non-public entity to his client or others unless as a minimum he complies with the provisions of this statement applicable to a compilation engagement. This precludes the accountant from merely typing or reproducing financial statements as an accommodation to his client."

The paragraphs dealing with compilation of financial statements provide, *inter alia*, the following standards:

A. Standard 10: The accountant must possess or acquire sufficient knowledge of the industry in which he prepares financial statements so as to prepare statements appropriate to that industry.

B. Standard 11: The accountant must possess a general understanding of the nature of the entities business and its business transactions and the form of its accounting records, *inter alia*, to determine whether it is necessary to perform other accounting services in order to prepare a proper financial statement.

C. Standard 12: If the accountant acquires information which should reasonably lead him to believe that the information supplied to him may be incomplete or inaccurate he must solicit further information from management and if they refuse to supply it to him he must withdraw from the engagement. Gould as corporate counsel and director of Continental participated in and knew of the true nature of the operations, statements of assets, status of contracts and licenses and all other misleading characteristics of the misleading statements and failures to state material facts alleged in Paragraph 12 and all sub-parts thereof and knew of and/or recklessly disregarded the impact of those items on the value of the securities offered for sale and sold to the plaintiff and also knew of and/or recklessly disregarded the facts which showed that the financial statements and other prospectuses and documents given to the plaintiff were materially misleading. His knowledge and con-

duct are imputed to Continental on whose behalf, *inter alia*, he acted.

D. Standard 13: Before issuing a report the accountant should make certain that that report is free from obvious material errors including inadequate disclosure.

E. Standard 14: The financial statement compiled without audit should state, *inter alia*, that the compilation is limited to presenting information which is the representation of management (owners).

F. Standard 19: When management requests that the accountant compile financial statements which omit substantially all disclosures or some disclosures required by generally accepted accounting principles the accountant must relate that fact in his report.

G. Standards 39-41: If the accountant becomes aware of departures from generally accepted accounting principles he should in addition to the provisions of Standard 19 disclose the departure and the effects of the departure if known and if not known to state that management has made no determination of the effects of the departure. If the modifications above are adequate to indicate the deficiencies the accountant should withdraw from the engagement.

18. Further, all of the defendants knew and intended and/or recklessly disregarded that the aforesaid acts and practices and misleading statements and omissions would materially affect the value of the securities of Continental and undertook said conduct knowing and intending that the plaintiff rely upon the truthfulness and accuracy of the representations made.

19. At the time the plaintiff purchased the securities he did not know and had no reason to believe that the representations provided to him and referred to in paragraph 12 and all sub-parts thereof contained untrue statements of material fact and/or material omissions.

20. Plaintiff purchased the securities in reliance upon the false and misleading statements of fact and because of his lack of knowledge of the material omissions.

21. The facts now complained of were material to the investment decisions of the plaintiff. Plaintiff is now aware that the value of his investment is substantially less than that which he was led to believe by the defendants and he has suffered substantial damage as a result of the wrongs complained of herein and his detrimental reliance thereupon.

WHEREFORE, plaintiff, MAX A. RUEFENACHT, demands judgment against the defendants, CHRISTOPHER O'HALLORAN, JOACHIM K. BIRKLE, W. GEORGE GOULD and CONTINENTAL IMPORT & EXPORT, INC., on the Third Cause of Action as follows:

A. Compensatory damages.

B. Costs of suit incurred including reasonable attorney's fees, expert's fees, disbursements and such other costs as may be taxed by the Clerk of the Court.

C. Such other and further relief as the Court may deem just in the premises.

FOURTH CAUSE OF ACTION AGAINST ALL OF THE DEFENDANTS FOR DAMAGES PREDICATED ON COMMON LAW FRAUD OR RECKLESS MISREPRESENTATIONS

22. The plaintiff incorporates herein by reference as though recited verbatim and at length all of the allegations of paragraphs 1 through 5, 7 through 10, 12 through 14, and 16 through 21 of the complaint.

23. The defendants did make the misrepresentations to the plaintiff and omit to state material facts willfully, deliberately, maliciously and with the intent that the plaintiff rely thereon in connection with his purchase of securities from the defendants; the plaintiff did, in fact, rely upon the material misrepresentations and/or omissions and in reliance thereon did make his

purchase from Continental as a result of which he has sustained substantial damage to his great detriment.

24. The plaintiff alleges that the defendants' statements were made knowingly, willfully, recklessly or intentionally and in wanton and reckless disregard of the rights of the plaintiff.

WHEREFORE, plaintiff, MAX A. RUEFENACHT, demands judgment against the defendants, CHRISTOPHER O'HALLORAN, JOACHIM K. BIRKLE, W. GEORGE GOULD and CONTINENTAL IMPORT & EXPORT, INC., on the Fourth Cause of Action as follows:

A. Compensatory damages.

B. Punitive damages.

C. Costs of suit incurred including reasonable attorney's fees, expert's fees, disbursements and such other costs as may be taxed by the Clerk of the Court.

D. Such other and further relief as the Court may deem just in the premises.

FIFTH CAUSE OF ACTION FOR RECISION ETC., PREDICATED UPON COMMON LAW, FRAUD OR RECKLESS MISREPRESENTATIONS AGAINST ALL OF THE DEFENDANTS

25. Plaintiff incorporates herein by reference as though recited verbatim and at length all of the allegations of paragraphs 1 through 5, 7 through 10, 12 through 14, 16 through 21, and 23 through 24 of the complaint.

26. The plaintiff has tendered his securities to the defendants, Continental, Gould and Birkle, and has offered to rescind the sale of the securities which tender and offer has been refused by the defendants.

WHEREFORE, plaintiff, MAX A. RUEFENACHT, demands judgment against the defendants, CHRISTOPHER O'HALLORAN, JOACHIM K. BIRKLE, W. GEORGE

GOULD and CONTINENTAL IMPORT & EXPORT, INC.,
in the Fifth Cause of Action as follows:

A. Granting to him rescission of the purchase of the securities and restoring to him all consideration paid for the securities together with interest thereon.

B. Costs of suit incurred including reasonable attorney's fees, expert's fees, disbursements and such costs as may be taxed by the Clerk of the Court.

C. Such other and further relief as the Court may deem just in the premises.

**SIXTH CAUSE OF ACTION AGAINST ALL OF THE
DEFENDANTS PREDICATED ON COMMON LAW
NEGLIGENCE AND NEGLIGENT
MISREPRESENTATION**

27. Plaintiff incorporates herein by reference as though recited verbatim and at length all of the allegations of paragraphs 1 through 5, 7 through 10, 12 through 14, 16 through 21, 23 through 24, and 26 of the complaint.

28. In the event that the conduct referred to above are not found to have been deliberate, willfull, wanton and/or reckless, the plaintiff contends that the wrongful acts of the defendants as alleged above and the misrepresentations made by them were grossly negligent and/or negligent. Specifically, but not by way of limitation, the plaintiff states that the defendants did commit the following negligent acts:

A. Continental and Birkle Did Negligently:

i. Misrepresent the good will and licensing value of Continental Import & Export, Inc.

ii. Misrepresent the import contract rights of Continental.

iii. Misrepresent the surplus in excess of par value of Continental.

iv. Misrepresent the total equity of Continental.

v. Misrepresent the financial viability of Continental and its value as an investment to the plaintiff.

vi. Misrepresent the status of their negotiations and contacts with potential distributors.

vii. Misrepresent the future profitability of Continental.

viii. Misrepresent that Brikle [sic] was a successful, sophisticated and experienced businessman.

ix. They were in other ways negligent.

B. O'Halloran Did Negligently:

i. Misrepresent the good will and licensing value of Continental Import & Export, Inc.

ii. Misrepresent the import contract rights of Continental.

iii. Misrepresent the surplus in excess of par value of Continental.

iv. Misrepresent the total equity of Continental.

v. Misrepresent the financial viability of Continental and its value as an investment to the plaintiff.

vi. Misrepresent the status of the negotiations and contacts with distributors.

vii. Misrepresent the future profitability of Continental.

viii. Fail to perform in accordance with the standards applied to certified public accountants generally and particularly those licensed to practice public accountancy in the State of New Jersey including his violations of various Sections of the Statements On Standards For Accounting and Review Services issued by the American Institute of Certified Public Accountants as recited generally in paragraph 17B above.

ix. Fail to examine, uncover and discern the improper values applied to good will, licenses and import contract rights.

x. Fail to uncover and discern the fact that there were no or substantially no import contract rights and/or that the licenses and good will of Continental were of a materially lesser value than that which he represented in connection with the financial statements and prospectuses in which he participated.

xi. Fail to adequately disclaim his responsibilities in connection with the preparation of the financial statements and prospectuses in question and to advise that he had performed no investigation of the underlying facts supporting the financial statements and prospectuses in question.

xii. Failed to properly evaluate the contract rights and licenses and future profitability of Continental.

xiii. Failed to adequately investigate and familiarize himself with the industry, business, business affairs, records and transactions of Continental before preparing the financial statements and other prospectuses.

xiv. He was in other ways negligent in the performance of his professional duties.

xv. Failed to state that Continental did not have the financial capacity to meet the projections made in the financial statements.

C. Gould Did Negligently:

i. Misrepresent the good will and licensing value of Continental.

ii. Misrepresent the import contract rights of Continental.

iii. Misrepresent the surplus in excess of par value of Continental.

iv. Misrepresent the total equity of Continental.

v. Misrepresent the financial viability of Continental and its value as an investment to the plaintiff.

vi. Misrepresent the status of the negotiations and contracts with distributors.

vii. Misrepresent the future profitability of Continental.

viii. Misrepresent that he possessed special knowledge of the alcoholic beverage industry.

ix. Misrepresent that Birkle was a successful, sophisticated and experienced businessman.

x. Failed to state that Continental did not have the financial capacity to meet the projections made in the prospectuses and financial statements.

xi. Failed to examine so as to ascertain and to uncover or discern, the fact that there were no or substantially no import contract rights and/or that the licenses and good will of Continental were of a materially lesser value than the value applied to those assets in the financial statements and prospectuses in which he participated and as a part of other representations made to the plaintiff concerning the financial condition of Continental and the value of an investment in the company.

xii. Failed to properly evaluate the contract rights, licenses and future profitability of Continental.

xiii. Failed to adequately investigate and familiarize himself with the industry, business, business affairs, records and transactions of Continental before submitting to O'Halloran the information upon which the financial statements and prospectuses were based and before other representations were made to the plaintiff concerning the financial condition of Continental and the value of an investment in the company.

xiv. Failed to provide O'Halloran with notice of deficiencies in the substance and method of compilation of the informa-

tion upon which the financial statements and prospectuses were based.

xv. He was in other ways negligent.

29. By virtue of the foregoing the plaintiff has been injured and is entitled to relief against the defendants and each of them.

WHEREFORE, plaintiff, MAX A. RUEFENACHT, demands judgment against the defendants, CHRISTOPHER O'HALLORAN, JOACHIM K. BIRKLE, W. GEORGE GOULD and CONTINENTAL IMPORT & EXPORT, INC., on the Sixth Cause of Action as follows:

A. Compensatory damages.

B. Costs of suit incurred including reasonable attorney's fees, expert's fees, disbursements and such costs as may be taxed by the Clerk of the Court.

C. Such other and further relief as the Court may deem just in the premises.

**SEVENTH CAUSE OF ACTION PREDICATED UPON
BREACH OF FIDUCIARY DUTY AND WASTE AGAINST
DEFENDANTS, BIRKLE AND GOULD**

30. Plaintiff incorporates herein by reference as though recited verbatim and at length all of the allegations of paragraphs 1 through 5, 7 through 10, 12 through 14, 16 through 21, 23 through 24, 26 and 28 through 29 of the complaint.

31. The plaintiff asserts that as a director, president and chief operating officer of Continental the defendant Birkle assumed a fiduciary duty to his co-shareholders including the plaintiff to act in a fair, evenhanded and just fashion toward them in his dealings with Continental and to concern himself above all with the welfare of Continental and not to abuse his position of dominance for his own gain or otherwise.

32. In fact the defendant Birkle did violate the fiduciary duty which reposed upon him, *inter alia*, by:

A. Refusing to make books, records and other documents of the corporation available to the plaintiff; and

B. Wasting corporate assets by using the funds of Continental for the purchase or payment of personal items for himself or other shareholders.

33. The plaintiff asserts that as a director and corporate counsel of Continental the defendant Gould assumed a fiduciary duty to the co-shareholders including the plaintiff to act in a fair, evenhanded and just fashion toward them in his dealings with Continental and to concern himself above all with the welfare of Continental and not to abuse his position of dominance for his own gain or otherwise.

34. In fact the defendant Gould as an agent and director of Continental did violate the fiduciary duty which reposed upon him, *inter alia*, by:

A. Refusing to make books, records and other documents of the corporation available to the plaintiff; and

B. Negligently attended to the affairs of Continental and/or knowingly and/or intentionally and/or recklessly misrepresented Continental's financial condition.

35. Plaintiff asserts that the conduct of the defendants, Birkle and Gould, as aforesaid was done willfully, maliciously and/or recklessly at the expense of the plaintiff.

36. As a result of the foregoing the plaintiff has been injured and is entitled to relief against the defendants, Birkle and Gould.

WHEREFORE, plaintiff, MAX A. RUEFENACHT, demands judgment against the defendants, JOACHIM K. BIRKLE and W. GEORGE GOULD, on the Seventh Cause of Action as follows:

A. Compensatory damages.

B. Punitive damages.

C. Costs of suit incurred including reasonable attorney's fees, expert fees, disbursements and such costs as may be taxed by the Clerk of the Court.

D. Such other and further relief as the Court may deem just in the premises.

DEMAND FOR TRIAL BY JURY

Plaintiff, MAX A. RUEFENACHT, herewith demands trial by jury of six persons on all issues so triable.

COHN & LIFLAND, ESQS.
PETER S. PEARLMAN, ESQ.
JEFFREY W. HERRMANN, ESQ.
Attorneys for Plaintiff

By: _____
PETER S. PEARLMAN
A Member of the Firm

DATED: November 20, 1981

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No.
80-4097

MAX RUEFENACHT,
Plaintiff,

-V-

CHRISTOPHER O'HALLORAN, ET AL,
Defendants.

(BENCH OPINION)

April 21, 1982
Newark, New Jersey

BEFORE: The Honorable H. Lee Sarokin, U.S.D.J.

WILLIAM SOKOL, C. S. R.
Official Court Reporter

THE COURT: Motion of Defendants for Summary Judgment.

Plaintiff Max Ruefenacht has brought this action under the federal securities laws, citing provisions in both the 1933 and 1934 Acts. He has named as defendants Continental Import & Export, Inc., a beverage importer, Joachim Birkle, the president of Continental, Christopher O'Halloran, a Certified Public Accountant who did some work for Continental, and W.

George Gould, a director of and corporate counsel to Continental. Defendant Gould now moves for summary judgment on the basis that the transactions sued upon did not involve "securities" as defined by federal law, and therefore there is no jurisdiction under the federal securities statutes. The other defendants join in the motion. In addition, if the federal claims are dismissed defendants request that the Court not exercise its pendant jurisdiction over the plaintiffs State law claims, and dismiss those also.

The amended complaint alleges that in early 1980 Birkle offered to sell stock in Continental to Ruefenacht, and pursuant to this offer provided various financial forms to Ruefenacht. At that time Continental was owned 49% by Birkle, 50% by Lenzenhof GmbH, a German company controlled by Birkle, and 1% by Birkle's wife. Plaintiff alleges that in reliance on the financial documents and other oral representations of defendants, he agreed to purchase 2500 shares of stock for \$250,000. This was to represent 50% of Continental, and no other person was to own more than 25%. Plaintiff has stated in deposition testimony that this price was in consideration of his promise to devote certain of his time, efforts and talents to Continental's business.

In fact, plaintiff did undertake a trip to Europe on behalf of Continental in pursuit of contracts to import beverages. This trip was moderately successful, and at that time it was thought that several contracts would be signed as a result of the trip. Ruefenacht was later involved in meetings resulting from his trip, between Continental and the firms he had contacted in Europe. Ruefenacht was also involved in the hiring of a national sales manager for Continental, expressing his views on an appropriate level of compensation. He claims that his participation contributed to the eventual contract, but that he had no real input into the final form. He states that he was only informed of the final form after it was signed.

In the course of his relationship with Continental, Ruefenacht signed a bank signatory card designating himself

to be the company's vice-president and treasurer. At his deposition he claimed that these designations were for the checks only, and that he was supposed to become Chairman of the Board. In any case, he claims that he never did sign any checks for Continental. Plaintiff also applied for and received a State solicitor's permit, representing under oath that on behalf of Continental he would sell various alcoholic beverages to retailers and wholesalers, and that he would be compensated by a salary, expenses and a percentage.

After Ruefenacht had paid \$120,000 toward his total of \$250,000, he began to suspect the accuracy of the financial data he had been given previously. At this point he refused to pay the remaining \$130,000, and to this date his total investment remains \$120,000. Having confirmed his suspicions to his own satisfaction, Ruefenacht filed this suit for fraud in connection with the sale of the 50% interest to him.

The Securities Act of 1933 provides:

When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, . . . 15 U.S.C. Section 77b. The 1934 Act contains a similar definition at 15 U.S.C. Section 78c(a) (10). Defendants contend that the transaction in the instant case did not involve the sale of a "security", as interpreted by the Supreme Court in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) and *SEC V. W.J. Howey Co.*, 328 U.S. 293 (1946).

There can be no real dispute in this case that the transaction involved stock. Defendant attempts to argue that because Continental is a closed corporation and its stock has certain limitations common to such corporations, that stock is by definition not a security. This is clearly not the case, since the Courts have consistently included closed corporations within the purview of the securities laws. See, e.g., *Thomas v. Duralite Co.*, 524 F. 2d 577 (3d Cir. 1975); *Bronstein v. Bronstein*, 407 F. Supp. 925, 931 (E.D. Pa. 1976), and cases cited therein. There-

fore defendants' contention must be based on the clause "unless the context otherwise requires," since on its face the statute clearly includes "stock" within its definition.

The Supreme Court has held that to conclude a transaction involves securities, a Court must determine that "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *SEC v. W.J. Howey Co.*, 328 U.S. at 301. See also *Forman*, 421 U.S. at 852.¹

In *Forman* the Court promulgated an "economic reality" test, holding that regardless of the name given to a given transaction, the Court must investigate the realities of the situation to determine if securities were actually involved. To aid in ambiguous situations, the Court set out five "common features of stock" which could serve as a guide to identify a true security:

- (1) the right to receive dividends contingent on profits;
- (2) negotiability;
- (3) ability to be pledged or hypothecated;
- (4) voting rights in proportion to shares owned; and
- (5) potential to appreciate in value.

See *Forman*, 421 U.S. at 851. In *Forman* an investment in a cooperative apartment house was found to lack these attributes, and in spite of the fact that the investment was characterized as "stock", the Court found that it was not a security. The Court has recently affirmed the use of this analysis, noting that "Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud." *Marine Bank v. Weaver*, Sec. Reg. & Law. Rep. (BNA), Vol. 14

¹The Ninth Circuit has held that for purposes of this test, "solely" means that the efforts of others must be "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *SEC v. Glenn W. Turner Enterprises*, 474 F. 2d 476, 482 (9th Cir.) cert. denied 414 U.S. 821 (1973). The Supreme Court has expressly reserved decision on this issue. *Forman*, 421 U.S. at 852 n.16.

p. 437, 438 (March 8, 1982). It is not entirely clear, however, that this test should be applied when the transaction involves what is traditionally known as "common stock."

The Fourth Circuit has held that "when a transaction involves stock, there is a strong presumption that the statutes apply." *Coffin v. Polishing Machines, Inc.*, 596 F. 2d 1202, 1204 (4th Cir. 1979). In *Coffin* the plaintiff had bought half the shares in Polishing Machines, Inc. and had moved to Virginia in order to devote his full time to duties as executive vice-president of the corporation. The Court noted that "(w)e do not believe that *Forman* denies a purchaser of ordinary corporate stock the protection of the federal securities laws simply because he intends to participate in the management of the corporation in which he invests." *Id.* The Court therefore held that although the transaction at issue could have been structured differently, when the parties elected to utilize a stock transfer they subjected themselves to the federal securities statutes. The *Coffin* approach has been adopted by at least three District Courts. *Bronstein v. Bronstein*, supra; *Titsch Printing Inc. v. Hastings*, 456 F. Supp. 445 (D. Colo. 1978); *Mifflin Energy Sources, Inc. v. Brooks*, 501 F. Supp. 334 (W.D. Pa. 1980).

However, several Courts have purported to reject the *Coffin* approach, and have applied the economic reality test to transactions involving traditional stock. See, e.g., *Canfield v. Rapp & Son, Inc.*, 654 F. 2d 459 (7th Cir. 1981); *Fredericksen v. Poloway*, 637 F. 2d 1147 (7th Cir. 1981); *Seagrave Corp. v. Vista Resources, Inc.*, Fed. Sec. L. Rep. (CCH) paragraph 98,469 (S.D.N.Y. February 24, 1982). In these cases, the Courts found that although the transactions nominally involved stock, the stock was actually peripheral to the main transaction, which was a transfer of control of a business. In all of the above cases 100% of the stock was sold, and in fact only one such case has been cited to the Court involving less than 100%. Even in that case 94.6% of the stock was transferred, and the Court noted that the buyer obtained "the right to exercise complete control over the day-to-day activities of the business." *Somogyi v. Butler*, 518 F. Supp. 970, 984 (D.N.J. 1981).

It is the fact that total control was transferred in the above cases that violated the *Howey* requirement that profits be generated primarily by the efforts of others. Thus, even though stock changed hands, the Courts concluded that the investment could succeed or fail on the efforts of the investor, and did not therefore qualify as a security. These cases can easily be reconciled with *Coffin*, since in the latter case only 50% of the stock was transferred and plaintiff did not have complete control over his investment. The heavy presumption mentioned in *Coffin* might be thought to be canceled by a showing that the investor is not so much interested in the stock as in the control of the business. Dealing with a situation admittedly far from normal common stock, the Supreme Court noted in *Weaver* that the buyers' power to "veto future loans gave them a measure of control over the operation of the slaughterhouse not characteristic of a security." 14 Sec. Reg. & Law. Rep. at 439.

In the present case the stock which Ruefenacht received contains all the attributes mentioned by the *Forman* Court as indicating that the transaction did involve a security. The crucial issue in this case, then, is the amount of control he gained over Continental. He did not have total control, owning only 50% of the stock, and he was not in control of the day-to-day activities, although he did participate in some of them. Although Ruefenacht contributed his talents and efforts to Continental's pursuit of business and profits, it has not been shown that this goal was to control the entire business. If he was not in overall control, the Court must conclude that the efforts of those who *were* running the business, such as Birkle, were to be the primary source of profits realized on Ruefenacht's investment. As such the investment would meet the test for a security, and the transaction would be governed by the federal laws. A hearing is necessary to resolve these questions. The Court will retain jurisdiction over both the federal and pended State claims, and defendants' motion is DENIED without prejudice to their right to renew upon the submission of all proofs.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No.
80-4097

Hon. H. Lee Sarokin

MAX A. RUEFENACHT,
Plaintiff,

v.

CHRISTOPHER J. O'HALLORAN, JOACHIM K. BIRKLE,
CONTINENTAL IMPORT & EXPORT, INC., AND
W. GEORGE GOULD,
Defendants.

AND

W. GEORGE GOULD,
Third-Party Plaintiff,

v.

DAVID BERNSTEIN, AUTOBERN TRADING CO., INC.,
ERNEST STOECKLIN, LENZENHOF GMBH,
Third-Party Defendants.

REPORT AND RECOMMENDATION

Plaintiff, Max A. Ruefenacht, claims that this action is brought under the Securities Acts and there is thus federal question jurisdiction in this court. Defendants, on the contrary, claim there is no transaction involving a "security" and that this court therefore has no jurisdiction. A motion for summary judgment was brought on before Hon. H. Lee Sarokin and it was determined that the crucial question is how much control over the business plaintiff obtained by purchasing half of the stock of a corporation. The matter was referred

to the magistrate to conduct a factual hearing on the issue and report findings.

The evidentiary hearing commenced on June 24th and during the noon recess, the matter was reported settled. Unfortunately, the settlement agreement was not performed and the matter was restored. The evidentiary hearing recommenced on November 19, 1982, after which both parties submitted proposed findings.

There is no dispute that Max A Ruefenacht and defendant Joachim K. Birkle made an oral agreement whereby Ruefenacht would purchase 50% of the shares of stock in Continental Import & Export, Inc. The other 50% of the shares would be owned by Birkle, a German corporation with which he was affiliated, and Birkle's wife. The purchase price was \$250,000.00 for the 2,500 shares, of which \$120,00.00 was paid. It is also undisputed that Ruefenacht and Birkle intended to enter into a written stockholder's agreement, drafts of which had been prepared by counsel but remained unsigned.

Continental was engaged in the business of importing and distributing beer, wine and liquors (T:15-3). Ruefenacht's wife's family is engaged in the brewery business in Europe and one of the reasons for his interest in Continental was the prospect of importing the family beer. (T:24-15) Ruefenacht described himself as a wine lover with an admiration for California wines (T:28-23). He had no professional background in the industry (T:33-13) and considered himself an amateur (T:33-16). Ruefenacht had been engaged in business as an exporter of automobile spare parts and accessories from the United States and the import into the United States of used motor vehicles (T:34-8). His company is one of the third-party defendants, Autobern Trading Co., Inc., in which Ruefenacht is associated with another third-party defendant, David Bernstein.

In addition to his interest in wines and his occupational background in the importing and exporting of motor vehicles and parts, Ruefenacht is multi-lingual, being fluent in English, German, French and Italian (T:43-24). While Mr. Birkle also

speaks German (T:16-9), it was thought that Ruefenacht's fluency in French would assist in dealing with French wine producers (T:44-11).

Ruefenacht looked upon himself as a partner in the business with Birkle (T:63-22). He and Birkle were to share together the "top level decisions of the company" (T:64-10). He and Birkle were to share the decisions involving the capital structure of the corporation (T:64-12) and the introduction of new product lines (T:64-24). It was contemplated that other persons in the management of the company would also be involved in the decision making process (T:65-6). Between June or July to October, 1980 (T:17-8), the period during which Ruefenacht was associated with Continental, no such decisions were made (T:66-22).

Throughout the period in question, Ruefenacht remained a full time employee of his Autobern company (2T:164-9). It is not disputed that Birkle was the president of Continental. It was Ruefenacht's intention that he would become chairman of the board (2T:160-10). Ruefenacht never attended any directors' meetings and none was ever held (2T:160-15). He did, however, sign a corporate resolution in a form supplied by the National State Bank (DG-3) in which he was designated as vice president and treasurer. The resolution was signed for the purpose of permitting Ruefenacht to sign corporate checks at a time when Birkle was leaving for a trip to France (2T:121-20). The action was taken at Birkle's request (2T:121-19) and was done while seated in a car in front of the bank (2T:122-14).

Ruefenacht disavowed any intent or any capacity to unilaterally assume control of the day to day business of Continental. It was intended that he receive a salary of approximately \$24,000.00 annually (2T: 124-18). His participation in the affairs of the company during the few months involved bespeaks an intention to actively participate in the company's affairs. Mr. Weidli, an employee of Autobern, was taken on by Continental as office manager (2T:52-6). Weidli was a close friend of Ruefenacht and was residing with him at the time of

the hiring (2T:53-5). Ruefenacht's business partner in Autobern, Mr. Bernstein, was to be paid \$500.00 weekly to handle the Continental books (2T:57-19). The other employees of Continental consisted of a secretary, who had apparently been with the company before Mr. Ruefenacht's association with it and two other persons who were selected by Birkle. Max Newman was hired as sales manager (2T:1712). Ruefenacht and Birkle discussed his hiring and the terms of his compensation (2T:19). It is not disputed that Birkle introduced Newman to Ruefenacht.

Larry Yaffa was engaged by Birkle without either the knowledge or approval of Ruefenacht as a professional advisor or consultant to Continental. Yaffa was paid on a daily basis and advised the company about the wine and liquor business (2T:46-20 to 47-23).

Ruefenacht participated in the business of Continental on a part time basis. During the summer of 1980 he travelled in France, Germany and Switzerland on his annual family holiday in Europe (T:61-9 to 63-23; 2T:162-8 to 21). During his vacation he called on four wine and spirit producers in the Alsace and southern Germany (T:61-8). He was acquainted with one of the companies because of his familiarity with his wife's family's brewery business (T:61-2). He apparently had with him a letter of introduction from Continental which he did not use (T:61-25). Although most of the producers were willing to continue talks, none of them ever came to the United States to pursue the contact (2T:61-11 to 65-2).

Ruefenacht participated with Birkle and Yaffa at luncheon meetings with approximately six French wine producers. The luncheons were generally at the Plaza Hotel in New York City. One was at the Metropolitan Club and one at the Moven Pick Restaurant in Hanover, New Jersey (2T:49-17 to 50-12). During these meetings Ruefenacht made use of his skill in French and translated for the non-French speaking participants written contracts which were being proffered to Continental by the French producers (2T:103-20 to 104-11). After lunch,

Ruefenacht would return to the Autobern office and Birkle would continue the discussions, later filling Ruefenacht in about the progress of the conversation (2T:105). In addition to the luncheon meetings, Ruefenacht and Birkle met approximately two dozen times at the Autobern office (2T:51-6). Ruefenacht kept track of the daily business of Continental by means of his almost daily conversations with Mr. Weidli (2T:55) and his very frequent conversations with Birkle (2T:56-19).

Together with Birkle and the entire personnel of Continental, Ruefenacht participated in a dinner at the Moven Pick Restaurant in Hanover, given for the Swiss Soccer Club. The object of the dinner was to promote a German sparkling wine and to obtain the brand for distribution (2T:117 to 120; 180-7 to 18).

Ruefenacht's interest in the company business is further exemplified by his urging the company lawyer to use dispatch in securing government approval for a particular label of wine (2T:175-13 to 20). At the request of Mr. Birkle, the company's lawyer revealed to Ruefenacht his recommendation on a proposed lease of a warehouse (2T:176-6 to 12). Ruefenacht had spent some time with Birkle visiting warehouses which were being considered for use by Continental (2T:69-13 to 71-13).

It was conceded by counsel for defendant Gould that the transaction between Ruefenacht and Birkle was to result in Ruefenacht's having something less than "total control" (2T:23-1) of Continental. It is further stipulated that Ruefenacht was to acquire 50% of the shares of the corporation. The remaining 50% of the shares would remain in another group of persons (2T:146-19). Counsel agreed that neither party to the transaction was in a position to take any action relative to the corporation without mutual consent of the other party (2T:149-23). Counsel agreed that in a deadlock situation either party had the power to veto a decision made by the other (2T:151-1 to 4). Counsel stated as follows at 2T:151-5 to 9):

As a matter of fact, as I think the evidence has already shown, Mr. Ruefenacht and Mr. Birkle were jointly in-

volved in all of the decisions, major decisions, especially—that were occurring for Continental and that was how they envisioned the deal in the first place.

When asked to point out any particular action which Ruefenacht could take without Birkle going along, counsel replied, "I don't think there is anything" (2T:153-7). Counsel suggested that by failing to pay the balance of the agreed upon purchase price for the 2,500 shares, Ruefenacht was in effect controlling the finances of the corporation. It is respectfully suggested that this is a specious argument.

CONCLUSION

Based upon the foregoing findings of fact it is concluded that Ruefenacht intended to purchase a 50% ownership of the shares of stock of Continental and to exercise all that control to which a 50% owner is entitled. It has not been shown that there was any possible way that Ruefenacht could have exerted more control. His actions were at all times subject to the absolute veto of his partner, Mr. Birkle. The actions of the parties are consistent with equality of control and joint participation in the business of the corporation is clearly demonstrated by the evidence presented. There is no evidence to the contrary.

SERENA PERRETTI
United States Magistrate

Dated: January 31, 1983
ORIGINAL TO THE CLERK
xc: Hon. H. Lee Sarokin
All Counsel

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

Civil Action No.
80-4097

MAX A. RUEFENAUCHT,
Plaintiff,

VS

CHRISTOPHER J. O'HALLORAN, JOACHIM K. BIRKLE AND
CONTINENTAL IMPORT & EXPORT INC.,
Defendants.

AND

CHRISTOPHER J. O'HALLORAN,
Third-Party Plaintiff,

VS

W. GEORGE GOULD,
Third-Party Defendant.

Newark, New Jersey
April 15, 1983

BEFORE: Honorable H. Lee Sarokin, U.S.D.J.

THE COURT: This matter comes before the court on a renewal of a summary judgment motion made by defendant W. George Gould. The facts of the case are summarized in this court's previous opinion on this motion; *Ruefenacht v. O'Halloran*, No. 80-4097 (D.N.J. April 21, 1982). Defendant Gould then moved for summary judgment dismissing the complaint for lack of federal jurisdiction.¹ Federal jurisdiction is based upon the federal securities laws. Defendant asserts that the transactions that are the basis of this suit did not involve

¹The other defendants in the case joined in the motion.

"securities" as defined in the federal securities laws. Defendant moves to dismiss the federal claims for lack of jurisdiction and to dismiss the pendent state law claims as a matter of discretion.

In its previous opinion the court discussed a controversial point of law that has divided the federal courts of appeal. Briefly stated, the question is whether a transaction involving ordinary stock is necessarily a security transaction under the federal law. The definitions of "security" in the federal statutes literally include "stock", but they also contain the words, "unless the context otherwise requires." 15 U.S.C. Section 77b; 15 U.S.C. Section 78c(a)(10). The Supreme Court and lower courts have applied an "economic reality" test² to determine whether transactions involve "securities" within the meaning of the federal statutes³, but the Supreme Court has never applied this test to a transaction involving ordinary stock. Several circuit courts of appeal have applied this test to ordinary stock transactions. *Frederiksen v. Poloway*, 637 F.2d 1147 (7th Cir.), cert. denied, 451 U.S. 1017 (1981); *Sutter v. Groen*, 687 F.2d 197 (7th Cir.1982); *King v. Winkler*, 673 F.2d 342 (11th Cir.1982); *Chandler v. Kew, Inc.*, 691 F.2d 443 (10th Cir. 1977). Two circuit courts of appeal have refused to apply the "economic reality" test to transactions involving ordinary stock, concluding that these transactions are literally within the definitions of "security". *Coffin v. Polishing Machines, Inc.*, 596 F.2d 1202 (4th Cir.1979), cert. denied, 444 U.S. 868 (1979), *Golden v. Garofalo*, 678 F.2d 1139 (2d Cir. 1982); *Seagrave Corp. v. Vista*

²"The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *S.E.C. v. Howey Co.*, 328 U.S. 293, 301 (1946).

³*United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); (*S.E.C. v. Howey Co.*, 328 U.S. 293 (1946); *Marine Bank v. Weaver*, — U.S. —, 102 S.Ct. 1220 (1982).

Resources, Inc., 696 F.2d 227 (2d Cir. 1982). The Third Circuit Court of Appeals has not yet ruled on this precise question.⁴

The court, in its previous opinion, determined that the "economic reality" test should be applied to transactions involving conventional stock to determine if they are entitled to the protection of the federal securities laws. The court characterized the crucial issue as "the amount of control" that plaintiff gained over the business whose stock was purchased (*Continental Import & Export, Inc.*). Slip. op. at 9. The court referred the matter to the Magistrate for a hearing, and denied the motion for summary judgment without prejudice to the right to renew upon completion of the hearing.

The court has received a Report and Recommendation from the Magistrate with detailed findings about the extent of control to be exercised by Mr. Ruefenacht in the business of Continental. Based on these findings, defendant Gould has renewed his motion for summary judgment.

The court has received objections to the Report and Recommendation from David Bernstein, a third-party defendant. Mr. Bernstein objects to the finding that Ruefenacht's "company is one of the third-party defendants, Autobern Trading Co., Inc., in which Ruefenacht is associated with another third-party defendant, David Bernstein" (emphasis added). Mr. Bernstein asserts that he was no longer associated with Mr. Ruefenacht or Autobern Trading Co., Inc., except as a shareholder in redemption, at the time of the transactions involved in this

⁴The court in *Golden* cited *Glick v. Campagna*, 613 F.2d 31 (3d Cir. 1979) as support for its position, at 678 F.2d 1142n.4. In *Glick* the court discussed the merits of regulating close corporations. 613 F.2d at 35n.3. This court has reviewed that decision and concludes that the court of appeals did not determine the precise question presented here. *Goodman v. DeAzoulay*, 554 F.Supp. 1029, 1034 (E.D.Pa. 1983). Several other district courts in this circuit have applied the economic reality test to transactions involving stock since *Glick*. *Anchor-Darling Industries, Inc. v. Suozzo*, 510 F. Supp. 659 (E.D.Pa. 1981); *Somogyi v. Butler*, 518 F.Supp. 970 (D.N.J. 1981); *Pallastrone v. Blimpie Industries, Ltd.*, No. 79-3328 (E.D.Pa. Dec. 9, 1981).

case. In addition, Mr. Bernstein objects to the findings that he was a continuing business partner in Autobern, and that he was to be paid five hundred dollars per week to handle the books and records of Continental. The court concludes that these findings are not necessary to a determination of the jurisdictional issue before it. Having received no opposition to their deletion from any other party, the Court will adopt the Report and Recommendation without these findings as to Mr. Bernstein.

The conclusion of the Magistrate regarding the extent of control to be exercised by Mr. Ruefenacht is as follows.

Based upon the foregoing findings of fact it is concluded that Ruefenacht intended to purchase a 50% ownership of the shares of stock of Continental and to exercise all that control to which a 50% owner is entitled. It has not been shown that there was any possible way that Ruefenacht could have exerted more control. His actions were at all times subject to the absolute veto of his partner, Mr. Birkle. The actions of the parties are consistent with equality of control and joint participation in the business of the Corporation is clearly demonstrated by the evidence presented. There is no evidence to the contrary.

At oral argument on this renewed motion counsel for plaintiff once again urged the court to adopt the position that the "economic reality" test does not apply to transactions involving ordinary stock. The court has considered the arguments of counsel and the legal developments that have occurred since its original decision and concludes that its previous decision to the contrary should remain. The "economic reality" test should be applied to transactions involving ordinary stock to determine whether they involve securities within the meaning of the federal securities acts.

In applying this test to the facts of this case the crucial question is whether the profits were to come "solely from the efforts of others." The other parts of the test are satisfied here, for the transaction involved investment in a common enterprise

with an expectation of profits. The findings of the Magistrate indicate that Mr. Ruefenacht intended to exercise joint control of the business with Mr. Birkle; there would be "equality of control." Based on these findings the court concludes that the profits of the enterprise would not be derived "solely" or substantially from the efforts of others. Therefore, the transaction does not involve "securities" within the meaning of the federal securities acts.

The key to the application of the "economic reality" test to this case is that plaintiff was an active investor who intended to participate significantly in the management of the business. He was not a passive investor who relied on others to manage the business. "Not all sales transactions which involve 'stock' are necessarily covered by the securities laws. Rather, the test for coverage, in general is whether the purchaser is placing money in the hands of another who will control the funds and the business decisions." *Frederiksen*, 637 F.2d at 1148. The court in *Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982), characterized this distinction as one between investors, who "rent capital to those who want to manage", and entrepreneurs, who "buy assets to manage." *Id.* at 202. Plaintiff here was acting as an entrepreneur, with an intent to jointly manage the business, rather than as a passive investor, who rented his capital to others who managed the business.

Although many of the cases relied upon by defendant involve a sale of virtually one hundred percent of a corporation's securities and assumption of complete control of the business,⁵ the amount of the stock purchased is not the determining factor. The more important factor is how much control the plaintiff intended to exercise over his investment. "It is apparent that the approach used here is not a function of numbers. A sale of less than 100% of the stock might not be covered by the Acts. A sale of 100% of the stock can be covered by the Acts."

⁵*Frederiksen v. Poloway*, supra; *King v. Winkler*, supra; *Chandler v. Kew, Inc.*, supra; *Anchor-Darling Industries, Inc. v. Suozzo*, supra; *Somogyi v. Butler*, supra.

King, 673 F.2d at 346. In *Goodman*, 554 F.Supp. 1029, the court found that the purchaser of one-third of the stock of a corporation did not purchase "securities" within the meaning of the federal securities acts. The evidence indicated that the purchaser had "active control of her investment." *Id.* at 1035. The Seventh Circuit Court of Appeals has created a rebuttable presumption to be used in cases where a large block of stock, but not 100%, has been purchased. *Sutter v. Groen*, 687 F.2d at 203. If the purchaser acquires more than fifty percent of the common stock of the corporation "his purpose in purchasing the stock will be presumed to have been entrepreneurship rather than investment." *Id.*⁶ In *Pallastrone v. Blimpie Industries, Ltd.*, No. 79-3328 (E.D.Pa. Dec. 9, 1981), the court found that purchasers of fifty percent of a company's stock had not purchased "securities." The court found that the "plaintiffs entered into the agreement with Figueroa for the purpose of purchasing a one-half interest in a business which they intended to operate and manage in conjunction with the defendant Figueroa . . ." Slip op. at 7.

The trend of the law is to apply the "economic reality" test to purchases of less than all of the company's stock to determine whether the purchaser would actively manage his investment. Because Mr. Reufenacht intended to jointly manage Continental with Mr. Birkle, he did not purchase "securities" as defined in the federal acts. Therefore, there is no jurisdiction to support the federal securities claims in the complaint. These claims are dismissed for lack of jurisdiction. There is no diversity of citizenship among the parties to support the pendent state law claims independently of the asserted basis for federal jurisdiction. The court, in its discretion, will dismiss these claims as well. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

⁶The court specifically did not consider the application of these principles to a purchase of fifty percent or less of a company's stock. *Id.*